86-845

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HUGH L. LATTA, et al,

Petitioners,

Vs.

CITY OF ATLANTA, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

1.

Were the zoning laws of the City of Atlanta administered in this case in an unconstitutional manner so as to deprive Petitioners (hereinafter "Latta") of due process?

2.

Was the zoning ordinance adopted by the City of Atlanta invalid because it was not in accordance with the Comprehensive Development Plan of the City?

3.

If the zoning ordinance was abritrary and unreasonable because it was not in accordance with the Comprehensive Development Plan, was the re-zoning power abused to the oppression of the neighbors?

4.

Even if the rezoning were held to be valid

by this Court, is Latta entitled to damages for inverse condemnation in violation of Article I, § 3, ¶ 1(a) of the Constitution of the State of Georgia?

5.

Is the City of Atlanta liable for damages to Latta because of violation by the City of 42 U.S.C. §1983?

STATUTES AND AUTHORITIES

Page

Constitutional Provision

1. Fifth Amendment to the U.S. Const. 3

2. Fourteenth Amendment to the U.S. Constitution 3

3. Article I, §3, ¶ 1(a), of the Constitution of the State of Georgia 3

Statutes:

1. 28 U.S.C. §1257 2

2. 42 U.S.C. §1983 3, 13, 17

TABLE OF CONTENTS

		Page
1.	Questions Presented for Review	ii
2.	Statutes and Authorities	iii
3.	Petition for Writ of Certiorari	1
4.	Jurisdiction	2
5.	Statement of Case	3
6.	Appendix	A-1
7.	Appendix	B-1
8.	Appendix	C-1
9.	Appendix	D-1

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PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

Petitioners, Hugh L. Latta, et al, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on September 3,1986.

OPINION BELOW

The opinion of the Supreme Court of Georgia has not been reported. The opinion, dated September 3, 1986, is set forth in full in the Appendix; this opinion simply affirmed the opinion of the trial court without further comment.

The opinion of the trial court is set forth in full in the Appendix and that opinion answered in the negative all of the questions presented for review in this petition.

JURISDICTION

The opinion of the Supreme Court of Georgia was issued and entered on September 3, 1986. The jurisdiction of this court is evoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

1.

The Fifth and Fourteenth Amendments to the Constitution of the United States.

2.

Article I, §3, ¶1(a), of the Constitution of the State of Georgia. (Appendix C-1)

3.

42 U.S.C. §1983. (Appendix, D-1)

STATEMENT OF CASE

1. DUE PROCESS

The City of Atlanta passed the most recent comprehensive zoning ordinance in 1982. Said ordinance, as amended many times, was in existence in 1973 and 1983 and continues in existence today. If a property owner wishes to have the zoning classifications of his property changed, he must file an application with the City of Atlanta by

which he requests the City Council to change the zoning laws as affecting his property. The Atlanta City Council refers this request to the Zoning Committee, who then refers it to the Zoning Review Board for a public hearing.

The Zoning Review Board is appointed by the Mayor of Atlanta, subject to the approval of City Council. The Zoning Review Board (hereinafter sometimes referred to as "Z.R.B.") is the public hearing body of the City Council created for the purpose of conducting public hearings on rezoning applications and special use permits.

Notices of a public hearing are given in the following manner:

(a) a sign is erected in front of the property

(b) a letter is sent to each property owner whose property lies within 300 feet of the subject property to be zoned

(c) a notice is placed in The Daily Report published in Atlanta wherein legal notices are usually placed

If the hearing before the Z.R.B. is not completed for some reason and if a subsequent meeting is announced and scheduled by Z.R.B., the three notices mentioned hereinabove are again used to notify owners of property of the second and subsequent hearing. The notice process is repeated for the subsequent hearing.

The public hearing before Z.R.B. is held at the City Hall in the chambers of Atlanta City Council, usually beginning at 6:00 PM for four or five hours. There are usually 200-300 people at each hearing. At the beginning of the hearing the Chairman announces that the applicant seeking rezoning shall be entitled to ten minutes to submit their argument and shall have the right to reserve any of that ten minutes for rebuttal.

The Chairman also announces that any opponents of the rezoning shall be allowed ten minutes in which to present their arguments regardless of the number of people in opposition and regardless of those who wish to speak in opposition.

No one on either side is placed under oath. There is no sworn testimony. Neither side has the opportunity to cross-examine any person. There is no cross-examination of witnesses by the opposition. The members of the Z.R.B. can question the witnesses and the ones making the presentation and argument, but no one is under oath. In this paragraph the ususal procedures of holding a public hearing before the Z.R.B. have been described and these were the procedures which were followed by Z.R.B. at the public hearing regarding the following applications on the date

set opposite them:

(a) U-73-32 on October 4, 1973

(b) Z-83-42 on May 12, 1983

(c) Z-83-42 on July 7, 1983

Application U-73-32 was an application for the use permit, which is more fully described hereinafter. There was a second hearing in 1974 and a third hearing in 1975 regarding this same application but no sign was posted and no notice was advertised in The Daily Report of the public hearings of 1974 and 1975 and no notices were sent to the Owners for the 1974 and 1975 meetings.

Zoning application Z-83-42 was an application to change the zoning of the subject site from residential use to "planned development mixed use" (P.D.U.). After the hearing on this application on May 12, 1983 the application was amended to change the zoning from Residential to "Planned

Development Housing" (P.D.H.), (both applications being more fully described hereinafter) and a public hearing on the amended application took place on July 7, 1983. There was no letter notice mailed to the adjoining property owners or to those whithin 300 feet of subject property prior to the second hearing on this application on July 7, 1983.

The testimony of the Chairman of the Zoning Review Board, which was taken on April 30, 1985, confirmed that at both meetings on May 12, 1983 and July 7, 1983, the applicant for the rezoning was granted 10 minutes to make his argument and all of those in opposition were granted ten minutes to respond; that no one was placed under oath; that there was no opportunity for cross-examination afforded to either the applicant or the opposition; that there were over 100 people present in opposition.

STATEMENT OF CASE

2. INVALIDITY OF REZONING ORIDIANCE

The Charter of the City of Atlanta provides that the City must adopt during each year a one year Comprehensive Development Plan (1 year C.D.P.) for the City of Atlanta and a Five Year Comprehensive Plan (5 year C.D.P.) for the City of Atlanta.

The adoption of the Zoning Ordiance known as Z-83-42 was contrary to and in violation of the 1983 one year C.D.P. which was adopted pursuant to the Charter of the City of Atlanta. One of the two primary purposes stated in the 1980 C.D.P. was to "promote well-maintained, stable and attractive neighborhoods". On page 65 of the 1980 one year C.D.P., it is stated that "the predominent land use in the northside, where subject property is located, is single family residential". On page 66 said C.D.P. states that "the majority of housing units are single family

homes, many of which are situated on large lots. The critical land use issue in this study area is the containment of commercial development within existing commercial nodes". On page 67, said C.D.P. states "with over one-half of the land in this area used for residential services, preservation of the residential character is a major concern in the northside" and further states "the residential assets of the area should be preserved by using the City's adopted land use plans to guide zoning decisions, thus preventing commercial encroachment into the neighborhoods."

As will be seen in said C.D.P. at page 64, the map of the "northside" not only includes this property but all of the City of Atlanta bounded on the east by DeKalb County, on the south by Peachtree Creek and some additional land, on the

west by the Chattahoochee River and on the north by the northern city limit of the City of Atlanta, which is above Chastain Park.

The rezoning ordinance known as Z-83-42 permits the construction of 45 condominium units on subject land, which is contrary to the residential character of land and is alien to this neighborhood to such an extent that said ordinance disregards the 1983 one year C.D.P. and is in violation of said C.D.P..

The same general principles as expressed in the 1980 Comprehensive Development Plans were also listed in 1982 and 1983 Plans. The 1983 Plan Volumn I, Pages 2 and 3 emphasize that neighborhood quality involves the quality of environment; the neighborhood revitalization is a major priority and that the Comprehensive Development Plan is defined by the City Charter as the legal

guide for growth and development of the City of Atlanta. On page 3, Volumn I, the Plan further states that "the purpose of the land use maps is to show acceptable patterns for future land use to serve as a guide for future development".

Volumn III, page 1, states that ever since 1970 the land use policy of the City of Atlanta has consistently featured three main concerns, the first of which is "emphasis on the preservation of neighborhoods".

The Zoning Administrator testifed in a deposition on April 23, 1985, at page 12, that said Zoning Ordinance Z-83-42 was in violation of the 1983 Comprehensive Development Plan of the City of Atlanta, parts of which were attached to said deposition as Petitioners' Exhibit to that deposition. The map of N.P.U. C 5 year plan, is part of the 1983 Comprehensive Development Plan.

STATEMENT OF CASE

3. VIOLATION OF RIGHTS OF PLAINTIFFS UNDER 42 U.S.C.A. §1983

Under the usual procedures followed by the City of Atlanta, after an application has been reviewed and voted upon by the Zoning Review Board, that application is forwarded to the Zoning Committee of the City of Atlanta. The Zoning Committee votes on the application and sends their recommendations to the City Council.

In this case, Z-83-42 was scheduled for a hearing before the Zoning Committee on July 26th, but the hearing actually took place on July 12th, without any notice to Latta.

When the application (a new zoning ordinance proposal) came before City Council in the latter part of July 1983, Barbara Asher, who along with Richard Guthman represents the area of Atlanta in which subject property is located, requested City

Council to postpone a vote on Z-83-42 because Richard Guthman was out of town and because said Guthman had been advised that the zoning matter would not be presented to Council on the 12th day of July, 1983 but would be presented at a later date. Councilperson Asher advised the City Council that there were some legal matters regarding this proposed rezoning about which, in Asher's opinion, the City attorney should first rule before the Council voted. Councilman Ira Jackson was ruled out of order when he tried to support the idea of postponing the hearing.

Although the public can not speak at a meeting of the City Council, Ackerman's representative was lobbying on the floor of the Council to have the vote on the zoning proceed as fast as possible. Ackerman's representative was Chuck Driebe, an attorney, who was a former member of City Council.

On April 28, 1983 after the application Z-83-42 was filed, Ackerman invited the City Council members for a dinner meeting at Michelle's Restaurant in the Georgia Pacific Building in Atlanta, Georgia. Drinks and dinner were served and then Ackerman made a presentation to eight or more members of City Council regarding his proposed re-zoning. Chuck Driebe was also present. Richard Guthman was not present.

Ackerman donated $5,000 to Mayor Andrew Young, who had the ultimate decision in this zoning matter. Ackerman donated $6,450 to seven members of City Council. This donation information came from the files of the Secretary of State of Georgia.

Ackerman testified that he had made contributions to all members of City Council in an amount "something less than $500".

REASONS WHY CERTIORARI SHOULD BE GRANTED

Zoning laws are designed and intended to enhance the orderly development of communities and cities, to protect the homes of invididuals and to promote the general welfare. If these zoning laws are not administered in a constitutional manner, irreparable damage can be and usually is suffered by many citizens.

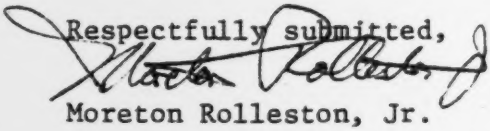
In the City of Atlanta, the only hearing which is afforded citizens is a 10 minute hearing before an appointed committee at which all statements and testimony are not under oath and not subject to cross-examination. Most zoning hearings concern a change in the law regarding zoning and are usually referred to as re-zoning hearings. More often than not, rezoning hearings involve many people, many homes and large sums

of money. It is simply not fair to either side to limit the presentation of information, evidence and argument to a period of 10 minutes each. It is improper that a decision on rezoning should be based on unsworn testimony which is not subject to cross-examination. It is illegal in Atlanta to adopt a rezoning ordinance which is not in accordance with the Comprehensive Development Plan of the City of Atlanta, as was done in this case.

Failure to follow the Comprehensive Development Plan of a city constitutes a violation of 42 U.S.C. §1983. This Court has not ruled on that theory of law.

Zoning is a national phenomena. The proper administration of zoning laws warrants the attention of this Court.

Respectfully submitted,



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APPENDIX

APPENDIX A

In the Supreme Court of Georgia

Decided: September 3, 1986

43486. LATTA et al v.ACKERMAN et al.

Judgment affirmed without opinion pursuant to Rule 59 of this court.

All the Justices concur except Weltner, J., not participating.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

HUGH L. LATTA, ET AL,	:	
	:	
Plaintiffs,	:	
V.	:	CIVIL ACTION
CHARLES S. ACKERMAN, ET AL,	:	FILE NO. D-1115
	:	
Defendants.	:	

ORDER

This action being before the Court on Plaintiff's motion for summary judgment filed December 7, 1984 seeking summary judgment on all issues of liability made in the complaint with the exception of breach of contract and further on Defendants, Ackerman & Co., Atlanta Progressive Club Co., and Charles S. Ackerman's motion on the issue of the validity and/or constitutionality of the action of the City of Atlanta in rezoning Defendant Ackerman & Co's property: Defendants.

Ackerman & Co. and Atlanta Progressive Club Co.'s motion for summary judgment and as to the standing of each of the plaintiffs; on these Defendants' motion for summary judgment as to Plaintiff's amended complaint asserting inverse condemnation and damages; on these Defendants' motion for summary judgment as to Plaintiffs' claims under 42 U.S.C. §1983; on Defendant Ackerman's motion for summary judgment as to breach of contract; and on these Defendants' motion to sever.

For the limited purpose of deciding the issue of the validity and/or the constitutionality of the zoning, this court will assume, without so deciding, that the Plaintiffs had standing to challenge the constitutionality of the action of the Defendant City of Atlanta in rezoning.

Plaintiff and these Defendants' motions came on for hearing before this court on May 1, 1985 and the remaining Defendants joined in these

Defendants' motions at that time. After searching the record and considering all evidence properly before this court, including all briefs, depositions affidavits, interrogatories, request for production, oral arguments and other matters properly before this court for consideration, this court finds and holds as follows:

A. DEFENDANT'S MOTIONS

1.

VALIDITY AND/OR CONSTITUTIONALITY OF THE ACTION OF THE CITY OF ATLANTA IN REZONING

The City of Atlanta comes before this Court with the presumption that its zoning actions are valid. DeKalb Co. v. Flynn, 243 Ga.679,680 (1979). Therefore, in order to withstand Defendants' motion for summary judgment on this issue, Plaintiffs must show this court at least some evidence which would support a finding that the City's action in rezoning was invalid.

"When neighbors of rezoned property, challenge the zoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is manifestly abused to the oppression of the neighbors." Cross vs. Hall Co., 238 Ga. 709, 711 (1977). As pointed out by the Defendants there are no allegations of fraud or corruption, and there is no evidence in the record before this court to substantiate fraud or corruption. Therefore, the inquiry here is directed to whether or not it can be said, as a matter of law, that the Board of Commissioners did or did not manifestly abuse the zoning power. The test is not that a proponderance of the evidence demonstrates that the zoning decision was unwise, but rather was it capricious, arbitrary and in disregard of the health, safety and welfare of the general public. "Neighbors of rezoned property cannot invalidate the rezoning by showing

that the proponderance of the evidence was against the zoning change." Cross v. Hall Co., 238 Ga. 709 (1977). "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control" Euclid v. Amber Realty Co., 272 U.S. 365 (1926); DeKalb Co. v. Chamblee-Dunwoody Hotel Partnership, 248 Ga. 186, 190 (1981).

The evidence before this Court on this issue shows no manifest abuse of that power. The evidence does show that a zoning application was filed and subsequently amended based on public hearings and interaction with the various neighborhood groups; that the planning staff of the City of Atlanta thoroughly scrutinized the zoning request; that notice of the rezoning was had as required by law; that the requested rezoning as amended met all applicable zoning requirements;

that at 3.8 units per acre the proposed development was within the recommended comprehensive development plan designation of zero to four units per acre for that area, and was consistent with similar developments which had been approved in the general vicinity; that two public hearings were afforded on the requested rezoning at which many of the Plaintiffs or their representatives appeared and voiced their position; that the requested rezoning was approved by the planning staff, the zoning review board, the zoning committee of counsel, the full Atlanta City Council, and was signed into law on July 21, 1983 by the Mayor of the City of Atlanta.

Although the Plaintiffs have asserted that the development will increase traffic in the general area and change the character of the neighborhood, that evidence is insufficient to support setting aside the zoning. City of

Marietta v. Traton Corp., 253 Ga. 64, 66 (1984).

Absent an allegation of fraud or corruption or any evidence which would support a finding that the City of Atlanta manifestly abused the zoning power, the Defendants motion for summary judgment on this issue must be granted. Johnson Glenn, 146 Ga. 605 (1900).

2.

STANDING OF THE PLAINTIFFS

The question of standing to challenge the rezoning is determined by a two step inquiry:

First, a person claiming to be agrieved must have a substantial interest in the zoning decision; and

Second, that interest must be in danger of suffering some special damage or injury not common to all property owners similarly situated. DeKalb Co. vs Wapensky, 253 Ga. 47, 48 (1984).

Clearly, those Plaintiffs who have no ownership interest in the property as to which they are claiming damage would not be proper parties to this action and could not meet the agrieved citizen special interest test. Those Plaintiffs are: Overaton A. Currie, William H. Cheney, Sr., Dr. S. Boyd Eaton, Mrs. Sam S. Ambrose, H. Glenn Fite, Robert L. Redfern and Sally H. Mundt.

The evidence before the court further indicates that most of the plaintiffs do not abutt or adjoin the Progressive Club property, are located a substantial distance away from that property, and further that these Plaintiffs cannot see the Progressive Club or the property on which it is located from their land. As to those Plaintiffs, there is no evidence in the record of any special damage, but to the contrary, the record clearly indicates that the damage of

which they complain is damage which is common to all property owners similarly situated. Those Plaintiffs are as follows: Benjamin and Marjorie Lemer (1 mile from the Progressive Club property), June R. Bishop (1 mile and a quarter from the Progressive Club property), David and Dianne Housemann (3,000 feet from the Progressive Club property), William A. Dobb (4,400 feet from the Progressive Club property), Dr. F. Levering Neely (3 quarters of a mile from the Progressive Club property), Thomas E. Abernathy, IV (1/2 mile from the Progressive Club property), Candyce and Paul Field (1 miles from the Progressive Club property), Adrianne and Vernon Little (1 mile from the Progressive Club property), Mark and Patricia Bell (2 miles from the Progressive Club property), James T. Langford (6/10 of a mile from the Progressive Club property), Marian L. Meyerson (8/10 of a mile from the Progressive

Club property), Thomas M. Jones (3/4 of a mile from the Progressive Club property), Mary Lu Mitchell (1/2 mile from the Progressive Club property), Howard L. Shaw (1/2 mile by road or 300 feet in a direct line from the Progressive Club property), Mrs. R. Kent Frazier (1 mile from the property), James D. Askren, II (3/4 of a mile from the property), Abe Schear (8/10 of a mile by road or 700 feet in a direct line from the property), Charles B. West (1,500 feet from the property), Net Klausman (1 mile by road or 650 feet in a direct line from the property), Mortimer R. Samms (1/2 mile by road or 1,000 feet in a direct line from the property), and Judith N. Fierer (3 miles from the property). Therefore, as to those Plaintiffs which do not abutt the Progressive Club property, cannot see the property and claim damages which are not special

but are the same as or similar to those suffered by all owners similarly situated, there is no standing.

As to the Plaintiffs which abutt and/or can see the property, while this court does not rule that they have standing as a matter of law, there may be a genuine issue of fact concerning that standing. Consequently, as to the Plaintiffs who do not abutt and cannot see the property, the Defendants' motion for summary as to the issue of standing is granted, but as to the Plaintiffs who abutt or can see the property, that motion is denied.

3.

PLAINTIFFS' AMENDED COMPLAINT

(INVERSE CONDEMNATION)

Plaintiffs have asserted that they relied upon the existing zoning and zoning maps of the city of Atlanta, and that as a result of the rezoning of the Defendant, Ackerman & Co.'s

property, their properties have been damaged or inversely condemned. Adjoining property owners do not have any vested right or interest in the zoning of adjacent land so as to prevent the governing authority from subsequently changing that zoning classification to a different use, and such reclassification does not violate equal protection or due process. Moragn vs. Thomas 207 Ga. 660 (1951); Neil v. City of Atlanta, 212 Ga. 687 (1956); Secinger v. City of Atlanta, 213 Ga. 566 (1957). Contrary to the Plaintiffs' assertions, the Plaintiff's complaints are general in nature and are the same as those which may be suffered by the public in general, and the Defendant, City of Atlanta, has no interest in and/or control over the property which was rezoned in that the property is privately owned, and is not operated by or on behalf of the public. Consequently, there is no public purpose, and the

rezoning did not in any way cause the taking of the Plaintiffs' property for public use. Johnson vs. Chatham Co., 167 Ga. App. 283, 285 (1983); Johnson v. City of Atlanta, 170 Ga. App. 586 (1968). Therefore, there is no condemnation of Plaintiffs' property.

The individual defendants, Ackerman, Ackerman & Co.and Atlanta Progressive Club do not have any right or power of eminent domain, and an examination of the record shows no evidence which would support a claim of inverse condemnation against the Defendants Charles S. Ackerman, Ackerman & Co., or the Atlanta Progressive Club Co. Therefore, Defendants' motion for summary judgment as to the inverse condemnation claim must be granted.

4.

42 U.S.C. §1983 CLAIMS

There are two essential elements which the Plaintiffs must prove in order to state a claim

under 42 U.S.C. §1983:

(a) The conduct complained of was committed by a person acting under color of state law, and

(b) That the conduct complained of deprived another person of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor. 451 U.S. 527, 535 (1981). Here, the Plaintiffs stated in oral argument before this court that the Section 1983 claims were against the Defendant, City of Atlanta, and not the Defendants, Ackerman & Co, Charles S. Ackerman, or the Progressive Club Co.

Further, claims against purely private persons, acting alone, cannot be substantiated under Section 1983. Taylor v. Nichols, 558 F2d 561,564 (10th Cir.1977); Rendell-Baker vs. Kohn,457U.S. 830 (1982); Blum vs. Yaretsky, 457 U.S. 991 (1982).

The mere failure to comply with state and

local notice or hearing requirements does not constitute a denial of due process; the non-compliance must have deprived the Plaintiffs of the federally required minimum protection and that is not shown by the record in this case. Morrow v. Bassman, 515 F. Supp. 587, 592 (S.D. Ohio 1981).

As to the Defendants, Charles S. Ackerman, Ackerman & Co. and the Progressive Club Co., there is no evidence that they acted under color of state law. Furthermore, there is no evidence that the conduct by any of the Defendants deprived the Plaintiffs of rights, privileges or immunities secured by the Constitution or laws of the United States.

Therefore, the Defendants motion for summary judgment on the Section 1983 claims must be granted.

BREACH OF CONTRACT

The essence of the breach of contract claim is that an oral agreement was entered into on behalf of the Plaintiffs with the Defendants. Charles S. Ackerman, Robert N. Hatfield, Jr.,and the Progressive Club Co. As a part of this agreement, the Plaintiffs or their attorneys were to prepare written covenants which were never prepared. The current zoning does not violate any condition or covenant of a prior zoning. Moreover, the adoption of the new ordinance effectively removed any prior conditions which were not adopted in the new ordinance. Vinings Assoc. Inc. v. New Paces Ferry Road Development Co, Inc. 231 Ga. 804, 805 (1974). The Plaintiffs are asserting that there was an alleged agreement, "..to cooperate in resisting condominium, apartments, and other developments different from single family dwellings which is the current characteristic of this neighborhood." However, "To constitute a valid contract,

there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. §13 3-1. Indefiniteness in subject matter so extreme as to not present anything upon which the contract may operate in a definit and distinct manner renders the contract void. Jones v.Ely, 95 Ga. App. 4 (1957); Peachtree Medical Bldg.Inc. vs. Keel , 107 Ga. App. 430 (1963); "A contract cannot be enforced in any form of action if its terms are incomplete or incomprehensible..." Bagwell vs. Hughes,Inc v. McConnell, 224 Ga. 659 (1968). A court will not carry a contract into effect where it is left to ascertain the intention of the parties by mere guess or conjecture. Green v. Zaring, 222 Ga. 195, 198, (1966); Hughes vs. McMichen, 164 Ga. App 304, 305 (1982). Secondly, any agreement which is not to be performed within one year of the date of its making is required to

be placed in writing in order to be enforceable. O.C.G.A. §13-5 30. The Plaintiffs in this case did not act to place the alleged agreement or covenants in writing.

An examination of the record clearly indicates that the negotiations which were taking place were between Overton Currie and a corporation known as Jewish Progressive Club Co., which is not a party to this action. The Atlanta Progressive Club Co. was not chartered until December 20,1978 and did not acquire title to the club property until that year.

Furthermore, on December 9, 1983, co-Defendant and an original co-Owner of the property, Robert N. Hatfield, Jr., was granted summary judgment as to the breach of contract claim based upon the same facts which are now before the court. That order was unappealed by the Plaintiffs.

Therefore, Defendants'motion as to liability on the contract issue is granted.

6.

MOTION TO SEVER

Based on this court's prior rulings, the motion to sever is moot. However, in the event that this matter is returned to this court for trial for any reason, this court hereby orders that the complaint for breach of contract against the Defendant, Charles Ackerman, be and is hereby severed from the remaining claims and defendants pursuant to the provisions of O.C.G.A. §9-11-42(b).

PLAINTIFFS' MOTIONS

1.

DUE PROCESS

Plaintiffs have asserted that they are entitled to summary judgment on the issue of due process asserting that the Plaintiffs did not receive adequate notice and that the procedure followed by Defendant City of Atlanta is unconstitutional.

The zoning process is a legislative process and is not a judicial process. Hall Paving Co. v. Hall County, 237 Ga. 14 (1976); Barrett v. Hamby, 235 Ga. 262, 265 (1975). Under the Constitution of this State, the City has broad authority as to zoning matters. Galfas v. Ailor, 81 Ga. App 13 (1950), and the actions of a city in exercising its zoning authority will not be disturbed by the courts unless they are clearly arbitrary and unreasonable. Matthews v. Fayette Co. 223 Ga. 220 (1974)

The requirements of due process are satisfied if individuals have reasonable notice and an opportunity to be heard and to present their claim or defense with due regard to the nature of the proceeding and the character of the rights which may be affected by it. Hancock vs. Board of Tax Assessors, 226 Ga. 370 (1970). Moreover, the due process clauses of the State and Federal Constitutions were not designed in interfere with

the police power of the state. Davis v. Stark, 198 Ga. 223 (1944). Where proper notice is given and a hearing is had, the rezoning of property does not violate due process of law. Atlantic Ref. Co. v. Spears, 214 Ga. 126 (1958), and notice by publication of a rezoning hearing to be held by a governing authority is proper and adequate insofar as the requirements of procedural due process and equal protection are concerned. F.D. Plaza, Inc. v. Waite, 230 Ga. 161 (1973). The evidence before this court shows that many the Plaintiffs or their representatives attended both public hearings on this zoning, that notice as required by law was had, and that the procedure for notice and hearing which took place in this case is the same as that which is afforded all parties to zoning matters.

The fundamental requirement of due process is the opportunity to be heard at a

meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976). The evidence indicates that the Plaintiffs were afforded due process. The Plaintiffs assertion concerning the right to cross examine and the nature of legislative proceedings have been disposed of adversely to the Plaintiffs by the Supreme Court of this state in Mayor & Aldermen of the City of Savannah v. Rauers., 253 Ga. 675 (1985)

Therefore, Plaintiffs motion for summary judgment on the issue of due process is denied.

2.

VALIDITY OF REZONING ORDINANCE

The Plaintiffs assert that the rezoning action by the City of Atlanta violated its comprehensive development plan. The evidence in the record clearly indicates that the request was within the Comprehensive Development Plan in that the rezoning was residential in character,

was at a density of 3.8 units per acre which was within the recommended density of zero to four unites per acre, and that the requested rezoning was in accordance with other projects in the area. Consequently, the Plaintiffs motion for summary judgment as to the validity of the zoning ordinance is denied.

3.

STANDING OF PLAINTIFFS

The issue of the standing of the Plaintiffs has been previously addressed and that ruling is incorporated herein.

4.

BREACH OF CONTRACT

This court has previously addressed the issue of breach of contract and therefore denies the Plaintiffs' motion with regard to breach of contract.

5.

INVERSE CONDEMNATION

The issue of inverse condemnation has been previously addressed above, and therefore this court denies the Plaintiffs' motion with regard to inverse condemnation.

6.

42 U.S.C. § 1983 CLAIMS

The section 1983 claims have been previously addressed by this court, and therefore this court denies Plaintiffs' motion with regard thereto.

This court has addressed all motions properly before it at the time of the hearing on May 1, 1985, and this court's ruling thereon makes the Defendant, City of Atlanta's Motion for summary judgment as filed on May 31, 1985 moot.

WHEREFORE, it is the order of this Court that:

Defendants, Ackerman &Co., Charles S. Ackerman and Atlanta Progressive Club Co's motion for summary judgment as to the validity and constitutionality of the City of Atlanta's rezoning action is hereby granted.

Defendant's motion for summary judgment with regard to the standing of the Plaintiffs is granted in part and denied in part;

Defendants motion for summary judgment on the inverse condemnation claims are granted;

Defendants motions for summary judgment as to 42 U.S.C. §1983 claims are granted;

Defendant Ackerman's motion for summary judgment as to breach of contract is granted; and

Defendants' motion tos ever, if there are any further proceedings before this court, is granted.

Plaintiffs' motions are denied.

SO ORDERED, this 26th day of September, 1985.

/s/ Clarence Cooper, Judge
Superior Court of Fulton Co.

Copies to:

Dick Wilson, Jr.
Dillard, Greer, Westmoreland & Wilson
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Moreton Rolleston, Jr.
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APPENDIX C

Article I, §3, ¶ 1(a), of the Constitution of the State of Georgia reads in part as follows:

> "Private property shall not be taken or damaged for public purpose without just and adequate compensation being first paid." (Emphasis added.)

APPENDIX D

42 U.S.C. §1983.

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

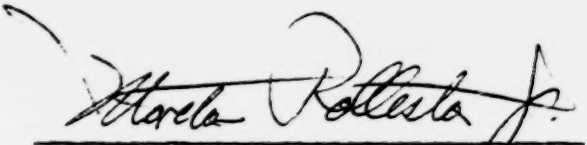
CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing "Petition for a Writ of Certiorari to the Supreme Court of Georgia" upon counsel for all parties by placing three copies in the United States Mail, postage prepaid, properly addressed, as follows:

Richard Wilson, Jr.
3414 Peachtree St., N.E.
Atlanta, Georgia 30323

Thomas A. Bowman
Suite 100 South
Omni International Bldg.
Atlanta, Georgia 30335

This 20th day of November, 1986.



Moreton Rolleston, Jr.